Supreme Court, U.S.
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No. 99-985

In the Supreme Court of the United States

KEELER DIE CAST, PETITIONER

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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39 pp

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that the union's solicitation of employees to express their support publicly for the union by signing a petition in advance of a scheduled certification election did not impair the employees' freedom of choice in determining whether to select union representation, and thus did not warrant setting aside the election result.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-13a) is reported at 185 F.3d 535. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (Pet. App. 14a-22a) is reported at 325 N.L.R.B. No. 79. The Board's underlying decision and certification of representative (App., *infra*, 1a-3a) is unreported. The hearing officer's report on petitioner's objections to the certification election (App., *infra*, 4a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1999. A petition for rehearing en banc was denied on September 17, 1999 (Pet. App. 23a-24a). The petition for a writ of certiorari was filed on December 9, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On October 7, 1996, respondent, the United Automobile Workers (UAW or Union) filed with the National Labor Relations Board (Board) a petition for a certification election at the Stevens Street plant of petitioner Keeler Die Cast in Grand Rapids, Michigan. The Union and petitioner stipulated to the appropriate collective bargaining unit for the representation election. On December 12, 1996, the representation election was held and 174 of the 181 eligible employees voted; 95 employees voted for union representation and 79 employees voted against such representation. Pet. App. 3a-4a.

Petitioner filed six objections to the election based on the Union's preelection conduct. A hearing was conducted and the hearing officer recommended to the Board that all of petitioner's objections be overruled and that a certification of representative issue. App., *infra*, 4a-22a. The Board adopted the hearing officer's recommendation and certified the Union as the representative of petitioner's unit employees. *Id.* at 1a-3a.

a. In this Court, petitioner challenges only the overruling of its objection based on the Union's solicitation of employees to declare their support publicly for the Union prior to the scheduled Board election. The facts relating to that objection are as follows.

The Union solicited employee signatures on two separate petitions during the organizational campaign. The first petition was used by the Union to establish the requisite showing of interest needed to invoke the Board's election processes.[1] The second petition, which is the subject of petitioner's objection, was circulated a few weeks before the election by employee supporters of the Union, who requested that their co-workers sign it if they intended to vote for the Union in the election. App., *infra*, 9a.

Each sheet of the second petition carried a caption at the top which read:

> We, the undersigned employees of Keeler Die Cast are voting YES on election day. We have heard all the company's arguments and accusations and we have listened to their promises. But we are standing up for ourselves, our families and our futures. YES for justice. YES for dignity. YES for a voice in our work place.

Pet. App. 6a. In a frame at the bottom of each sheet was a provision which read:

> I understand that my signature will be used in a leaflet or in any other way that shows my commitment to taking charge of my own future.

Ibid. A union organizer told the employees circulating the second petition that it was "to gauge whether there was enough support for the Union," and that if "there wasn't enough support for the formation of the Union,

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[1] In the case of a petition filed by a labor organization seeking certification, the Board will ordinarily not proceed to an election unless the petitioner shows that it has been designated by at least 30% of the employees in the bargaining unit to represent them. See 29 C.F.R. 101.17, 101.18.

then it was no sense having an election." C.A. App. 73; see also *id.* at 74-75, 77-78. The organizer gave the same explanation in a letter dated December 3, 1996, which he sent to all employees. *Id.* at 222-223.[2]

The signatures of 102 employees were obtained on individual sheets, which were then returned to the Union for incorporation into a single document. Copies of the document were distributed to employees during a shift change the day before the election. No evidence was presented before the Board indicating that any of the signatures were forged, although two employees signed the petition twice. Some witnesses testified that they were told that the Union intended to cancel the election if an insufficient number of employees signed the second petition. App., *infra*, 10a. No evidence was presented to the Board establishing that employees were coerced into signing the second petition by means of threats, intimidation or promises of benefits. Petitioner elicited testimony, however, that one employee held the petition for five days before signing it, that another employee was asked on three separate occasions to sign the petition, that one employee was told that a wager had been made that he could be convinced to sign the petition, and that another employee was told that he had to sign the petition. *Ibid.*

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[2] The letter, in relevant part, stated: "If a majority won't sign the petition, it indicates you can't win an election and there is no sense having an election if you can't win. It wouldn't be fair to freeze you out for another year with no opportunity for another election." C.A. App. 223. Section 9(c)(3) of the National Labor Relations Act, 29 U.S.C. 159(c)(3), prohibits the Board from directing an election "in any bargaining unit * * * within which in the preceding twelve-month period, a valid election shall have been held."

b. The hearing officer's recommendation that petitioner's objection to the second petition be rejected was based on the well settled principle that a union's poll of employees to determine support for an upcoming Board election is permissible so long as the union does not engage in coercion in connection with the polling. App., *infra*, 11a (citing *Glamorise Found., Inc.*, 197 N.L.R.B. 729 (1972); *Springfield Hosp.*, 281 N.L.R.B. 643 (1986); *Omni Manor, Inc.*, 309 N.L.R.B. 693 (1992)). The officer found that neither the Union's polling of employees via the second petition, nor its publishing of the results as a means of expanding and solidifying support, was *per se* objectionable conduct. App., *infra*, 11a-12a; see *Kusan Mfg. Co.* v. *NLRB*, 749 F.2d 362, 364 (6th Cir. 1984).

The hearing officer rejected petitioner's contention that the Union coerced employees by threatening to cancel the election. He explained that, under the Board's rules (29 C.F.R. 102.60(a)), the Union had a right to request withdrawal of its election petition, but such withdrawal was subject to the approval of the regional director and would not be granted if employee rights would be adversely affected. App., *infra*, 12a-13a.

The hearing officer also rejected petitioner's contention that the second petition falsely and deceptively portrayed the Union's support in the unit. Noting that petitioner presented testimony from several witnesses that they signed the petition even though they had no intent to vote for the Union at the election, the hearing officer stated that the Union could not be held responsible for the fact that "some employees may have signed the second petition for some reason other than to reflect their true intent at the time of signing," especially since "no evidence was presented to indicate that

[the Union] intentionally misrepresented its support or that any employee was coerced into signing the petition." App. *infra*, 13a-14a.

Finally, the hearing officer found unconvincing the testimony of some witnesses that they were misled into signing the petition because they had been told that their signatures would not be published. He explained: "Each page of the petition carried a printed portion at the bottom of each page which stated 'I understand that my signature will be used in a leaflet or in any other way that shows my commitment to taking charge of my future.' If any employee had any question how their signature might be used after reading this portion of the petition, or if they failed to read this section before signing, the misconception was corrected by [the Union's] letter of December 3." App., *infra*, 14a. That letter "was sent to all unit employees while the second petition was being circulated," and stated that "by signing the second petition, 'you are giving permission to use your name in a leaflet indicating your support.'" *Ibid.*

Therefore, the hearing officer recommended that petitioner's objection to the December 12, 1996 election, based on the second petition, be overruled. As noted above, the Board adopted that recommendation, as well as the hearing officer's recommendation to reject petitioner's other objections, and it certified the Union.

c. After issuance of the Board's certification, petitioner refused the Union's request to bargain. Pet. App. 18a. The Union then filed an unfair labor practice charge with the General Counsel of the Board. The General Counsel issued a complaint alleging that petitioner had violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(5) and (1). The Board upheld the allegations of the

complaint and ordered petitioner to bargain with the Union. Pet. App. 14a-22a.

2. The court of appeals enforced the Board's order. Pet. App. 1a-13a. The court rejected petitioner's several arguments, including its contention that the second petition was inherently coercive. *Id.* at 5a. The court disagreed with petitioner's reliance on *NLRB* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973), and found that "the actions of the UAW in the present case do not involve the inducements and coercion described" in *Savair*. Pet. App. 6a. Rather, the Union, "in an effort to ascertain the level of its support among employees prior to the date of the election, simply asked employees to sign sheets that stated clearly" that the signer was "voting YES on election day," and that the signer understood that "my signature will be used in a leaflet or in any other way that shows my commitment to taking charge of my own future." *Ibid.*

The court noted that a union's pre-election polling is not inherently coercive and cannot be successfully challenged unless the employer establishes that such polling "*in fact* was coercive and *in fact* influenced the result of the election." Pet. App. 6a-7a (quoting in part *Kusan Mfg. Co.* v. *NLRB*, 749 F.2d 362, 365 (6th Cir. 1984)). The court emphasized that, here, the Union did not have an interest in coercing employees to sign the second petition because the Union was attempting to gauge its chances of election success and pressuring employees to sign would have been adverse to the Union's purpose. Pet. App. 7a. Furthermore, the court found that, although petitioner "offer[ed] testimony that some employees were asked more than once to sign the petition and that one employee was told that co-workers had wagered on whether he would sign the lists," such evidence "does not establish coercion to sign

or, more relevantly, coercion to vote for union representation." *Ibid.* Indeed, "the employees allegedly 'badgered' to sign the petition stated unequivocally that no threats or coercion were involved in their conversations with co-workers and that they did not intend to vote for the Union in any event, despite signing the petition." And "the employee claiming to be traumatized by his co-workers' bets on his signing testified that he did not, in fact, sign the petition." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. Petitioner erroneously contends (Pet. 5) that the decision below conflicts with *NLRB* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973). In *Savair*, a union announced a waiver of its initiation fee before an election. The waiver applied only to employees who signed union recognition slips before the election. *Id.* at 272-273. The Court held that the selective fee waiver impermissibly interfered with employee free choice to vote for or against union representation. First, the union was able to "buy endorsements" and thus "paint a false portrait of employee support during its election campaign." *Id.* at 277. Second, some employees may have felt obligated, when they subsequently voted in the election, "to carry through on their stated intention to support the union." *Id.* at 278.

The court below properly concluded (Pet. App. 6a) that "the actions of the UAW in the present case do not involve the inducements and coercion described in *Savair*." The Union did not offer petitioner's employees an economic benefit if they signed the second

petition indicating that they intended to vote for the Union on election day. Rather, as the court below noted (*id.* at 7a), "the union attempted, through the pre-election poll, to gauge accurately the UAW's chances of ultimate success in the election." Moreover, as the court found (*ibid.*), petitioner, which had the burden of proof on this issue,[3] produced no evidence that any employee was coerced to sign the petition, or, "more relevantly, [was coerced] to vote for union representation in a secret ballot." *Ibid.*

Petitioner contends (Pet. 6), however, that the Union improperly induced employees to sign the second petition by "telling them if they did not sign the petition, there would be no election and they would effectively be disenfranchised," which "caused employees who would not have otherwise signed the document to sign it, thus creating the false portrait of support condemned in *Savair*." That contention is not borne out by the facts of this case. The second petition, on its face, provided a strong disincentive to any employee's signing it if he or she did not actually intend to vote for the Union in the election. The petition contained not only an express declaration that the signer intended to vote "yes," but also expressly authorized the Union to publicize that fact by using his or her signature in the Union's campaign literature. Accordingly, there is no reason to believe that the petition reflected a "false" level of employee support for the Union. See *Savair*, 414 U.S. at 277.

Furthermore, the Union's purported "threat" to cancel the election was, in fact, a promise to press for an

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[3] See *NLRB* v. *Mattison Machine Works*, 365 U.S. 123, 124 (1961); *Dayton Hudson Dep't Store Co.* v. *NLRB*, 987 F.2d 359, 363 (6th Cir. 1993).

election, at such time as an election made strategic sense for the Union and its supporters. In its December 3, 1996, letter, which was sent to employees while their signatures were being solicited on the second petition, the Union was unequivocal in its commitment to organizing petitioner. See C.A. App. 222-223. The December 3 letter made it clear to employees that the Union intended to proceed to an election at some point in time; the only issue was whether it would make sense to proceed with the election on the scheduled date, in the event that petitioner's counter-campaign to erode employee support for the Union had been successful. Thus, the Union's letter clearly explained:

> [O]nce you have an NLRB election, you cannot have another one for a year. That is why the company is trying so hard to get you to vote against your best interest. * * * [Y]our election is much to [*sic*] important to take any chances with. You need to know that you can win and more importantly, that [company] workers are sticking together—to make Keeler Die Cast a better, more productive place to work.

Ibid. And, so as to leave no doubt about the Union's intentions, the letter closed by emphasizing that "*[y]ou [the employees] are going to be the union at Keeler Die Cast*" but "there is no sense having an election if you can't win. It wouldn't be fair to freeze you out for another year with no opportunity for another election." *Id.* at 223; see note 2, *supra.* In these circumstances, the Board reasonably concluded that the Union, which had the right to request withdrawal of its election petition under the Board's rules (see p. 5, *supra*), did not engage in objectionable conduct by advising employees that it would not proceed to an election unless a

sufficient number of employees manifested their continued support for the Union by signing the second petition. Indeed, as the court below noted (Pet. App. 7a), the Union "had absolutely no interest in coercing employees to sign the petition" because the Union's reason for procuring the petition, which was fully disclosed to the employees—namely, to plot its election strategy—depended upon the petition's providing an accurate measure of employee support.

Petitioner also contends that the finding of the court below that the second petition, standing alone, was not coercive ignores the teaching of *Savair* that "[a]ny procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it." Pet. 8-9 (quoting *Savair*, 414 U.S. at 278). According to petitioner (Pet. 9), employees "opposing the union, or even those who were at the time undecided as to their preference, were required to sign this petition stating their intention to vote for the Union or else not be afforded the opportunity to vote at all."

As explained above, however, the Union did intend to proceed to an election; it circulated the second petition to determine whether to proceed to an election on the scheduled date or, instead, to seek to postpone an election until a later time. Nothing in *Savair* suggests that employees opposing the union, or those who are undecided, have a right to require the union and its employee supporters to proceed to an election at any particular time.

Finally, there is no merit to petitioner's assertion (Pet. 18) that the second petition was "false" because the Union promised employees that "their names would not be made public" if they chose to sign it. Although some witnesses testified that they were misled into

signing the second petition by being told, *inter alia*, that their signatures would not be published, the hearing officer found that testimony not "convincing." App., *infra*, 14a. As explained above (at p. 6), the specific language of the petition itself and the discussion of that language in the Union's December 3, 1996, letter (which was sent to all unit employees while the petition was being circulated) made it clear that employees "should have realized that their signatures might be used by the [Union] in its campaign literature." *Id.* at 15a.[4]

2. Petitioner contends (Pet. 12-18) that the decision of the Sixth Circuit in this case conflicts with that court's decision in *NLRB* v. *Gormac Custom Manufacturing Co.*, 190 F.3d 742 (1999). But the *Gormac* court itself recognized that the two decisions are factually distinguishable.

First, the *Gormac* court explained that, in the instant case, "employees did explicitly agree to 'vote yes' (nonbinding though it was) and to have their signatures used in a leaflet to let others know that they would 'vote yes'" (190 F.3d at 748); whereas in *Gormac*, "though the three employees signed an authorization card which gave the [union] permission to use their names on flyers, at no time did they agree to 'vote yes'

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[4] Petitioner's reliance (Pet. 10-11) on *NLRB* v. *Roney Plaza Apartments*, 597 F.2d 1046 (5th Cir. 1979), is misplaced. There, the court found that union adherents planned from the outset to tell each employee solicited to sign a union authorization card that all of the other employees had already signed, and that, consistent with this strategy, nearly all of the cards were obtained in one day. The court thus concluded that the cards had been procured through a "concerted plan of serious misrepresentation." *Id.* at 1052-1053. By contrast, the hearing officer found that the Union here did not engage in any misrepresentation in soliciting signatures to the second petition. App., *infra*, 13a-14a.

for the union or to allow their signatures to be used to encourage others to 'vote yes'." *Ibid.* Second, the *Gormac* court noted that, in the instant case, the court had "held that no showing of coercion had been made"; whereas in *Gormac*, "there was a prima facie showing of coercion * * * by the Union in its pre-election polling activities." *Id.* at 750. Moreover, in the instant case, "there were no misrepresentations made in order to get more employees to sign the authorization card, as occurred [in *Gormac*]," "the language on the 'petition' was materially different," and (unlike in *Gormac*) the Board granted the employer an evidentiary hearing on its objection. *Ibid.* Finally, the *Gormac* court remanded the case to the Board for an evidentiary hearing without passing on the validity of the employer's election objection. *Id.* at 751.

In any event, even if petitioner's contention were correct, an intra-circuit conflict provides no basis for this Court's intervention. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2000

APPENDIX A

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case GR-7-RC-20932

KEELER DIE CAST, EMPLOYER

AND

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO, PETITIONER

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board has considered objections to an election held December 12, 1996, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 95 for and 79 against the Petitioner. There were no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's

findings and recommendations[1], and finds that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees including all leadmen, quality auditors and material handling clerks employed by the Employer at its facility located at 236 Stevens Street, S.W., Grand Rapids, Michigan; BUT EXCLUDING all office clerical employees, quality analysts, technical employees, professional employees, casual employees, guards and supervisors as defined in the Act.

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[1] We adopt, pro forma, in the absence of exceptions, the hearing officer's recommendation that the Employer's Objections 4 and 5 be overruled.

Dated, Washington, D.C., September 3, 1997.

William B. Gould IV, Chairman

Sarah M. Fox, Member

John E. Higgins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

Case GR-7-RC-20932

KEELER DIE CAST, EMPLOYER

AND

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO, PETITIONER

HEARING OFFICER'S REPORT AND RECOMMENDATIONS TO THE BOARD ON OBJECTIONS TO CONDUCT AFFECTING RESULTS OF ELECTION

Upon a petition filed on October 7, 1996,[1] and pursuant to a Stipulated Election Agreement executed by the parties and approved by the Regional Director of Region 7 of the National Labor Relations Board on November 6, an election by secret ballot was conducted on December 12, among the employees in the following appropriate collective bargaining unit:

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[1] All dates refer to 1996 unless otherwise noted.

All full-time and regular part-time production and maintenance employees including all leadmen, quality auditors and material handling clerks employed by the Employer at its facility located at 236 Stevens Street, S. W., Grand Rapids, Michigan; BUT EXCLUDING all office clerical employees, quality analysts, technical employees, professional employees, casual employees, guards and supervisors as defined in the Act.

The payroll period for eligibility was the weekly period ending, Sunday, October 27.

Upon the conclusion of the count of ballots, a copy of the Tally of Ballots, indicating the following results, was made available to each of the parties in accordance with the Rules and Regulations of the Board:

Approximate number of eligible voters	181
Void ballots	0
Number of votes cast for Petitioner	95
Number of votes cast against participating labor organization	79
Number of valid votes counted	74
Number of challenged ballots	0
Number of valid votes counted plus challenged ballots	174

THE OBJECTIONS

On December 19, the Employer timely filed "Employer's Objections To The Union's Pre-Election Conduct," a copy of which was served by the Grand Rapids Resident Office upon the Petitioner on the same date. The Employer's objections allege as follows:

> "1. During the time in which laboratory conditions were in effect, the UAW as a matter of policy coercively required employees to openly and publicly state how they were going to vote in the election, in a binding and unambiguous manner and upon penalty of canceling the election, and within 24 hours prior to the election disclosed the results of that vote by individual employee. The UAW's conduct is highly objectionable for several reasons, including but not limited to the fact that it destroys the integrity of the secret ballot; undermines the exclusive authority of the NLRB and its established safeguards and processes by effectively placing the UAW in control of the election process; is in gross disregard of the employees' Section 7 rights to freely, fully, and privately participate in the process without fear of retribution; and because the votes were obtained through coercion, inducements, and misrepresentations, union support was not only falsely but deceptively portrayed.
>
> 2. The Union electioneered at the polls by posting campaign propaganda in outside windows of the polling area in clear view of all voters throughout the first voting session.

3. On December 6, 1996, the Union stole privileged, confidential Company memoranda and published it for propaganda purposes and to misrepresent to employees that it had unique access to Company files and information.

4. Within 24 hours of the election the Union published what purported to be a promise by key customers of enhanced job security if the Union was elected to represent employees.

5. The Union falsely promised employees that if it was elected, employees at Keeler Die Cast would have their own local UAW union and would not be a part of an amalgamated local.

6. By the above and other conduct, the Union interfered with, coerced, and restrained employees in the exercise of their Section 7 rights and interfered with their ability to exercise a free and reasoned choice in the election."

On January 8, 1997, the Region [*sic*] Director issued a Report and Notice of Hearing on Objections to Conduct Affecting the Results of the Election, directing that a hearing be held before a hearing officer designated by the Regional Director for the purpose of resolving the issues raised by the Employer's objections. The hearing officer was directed to prepare and cause to be served on the parties a report containing resolutions of credibility of the witnesses, findings of fact, and recommendations to the Board as to the disposition of the objections.

Accordingly, on January 29 and 30, 1997, a hearing was held pursuant to said Notice in Grand Rapids,

Michigan before the undersigned hearing officer duly designated for the purpose of conducting such hearing. The hearing was conducted in accordance with the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended. The Employer and the Petitioner entered appearances and were afforded full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce any relevant evidence bearing on the issues presented by the Employer's Objections.

Upon the entire record in this case[2], and from my careful observations of the demeanor and manner of the witnesses while testifying under oath, I make the following findings:[3]

Objection No. 1

Objection 1 alleges that Petitioner coercively required employees to openly state how they intended to vote in the representational election. The Employer argues that employees were coerced into signing this

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[2] On February 18, 1997, the Employer filed a motion to correct the transcript. The motion contained 28 paragraphs noting an alleged error in each paragraph. On February 29, 1997, the Petitioner filed an objection to the paragraphs 1, 4, 5, 6, 9, 14, 17, 18 and 21 of the Employer's motion. After a careful examination of the transcript, I hereby grant the Employer's motion in its entirety and over the Petitioner's objection to the paragraphs noted above.

[3] In the resolution of all issues for which the credibility of oral testimony becomes a factor, I have carefully considered the demeanor and the conduct of the witnesses, as well as their candor, their objectivity, their bias or lack thereof and have carefully weighed the witnesses' understanding of the matters to which they have testified, the plausibility, consistency and probability of their testimony, as well as whether parts of their testimony should be accepted when other parts are rejected.

petition by the Petitioner's threat to cancel the election if an insufficient number of employees failed to indicated [*sic*] their intent to vote for the Petitioner at the election. It contends that the Petitioner distributed the results of the poll to employees within 24 hours of the election and that the polling falsely and deceptively portrayed the results of the poll. It argues that both the polling and the publishing of the results of the poll constitute objectionable conduct by destroying the integrity of the secret ballot election, placing the Petitioner in control of the election process, undermining the Board's authority to conduct elections, and disregarding the employee right to participate in the election without fear of retribution.

The evidence reveals that the Petitioner solicited employee's signatures on two separate petitions during the organizational campaign. The first petition was used to establish the requisite showing of interest needed to invoke the Board's election processes. The other petition, herein referred to as the "second petition," was used by the Petitioner to gauge its support immediately prior to the election. Employees that supported the Petitioner circulated the second petition and requested that employees sign it if they intended to vote for the Petitioner at the election.

Each sheet of the petition carried a caption at the top which reads as follows:

> "We, the undersigned employees of Keeler Die Cast are voting YES on election day. We have heard all the company's arguments and accusations and we have listened to their promises. But we are standing up for ourselves, our families and our future,

> YES for justice, YES for dignity, YES for a voice in our work place."

In a frame at the bottom of each sheet was a section which read as follows:

> "I understand that my signature will be used in a leaflet or in any other way that shows my commitment to taking charge of my future."

After the signatures were obtained, the individual sheets were returned to the Petitioner and incorporated into one single document consisting of 10 pages, Employer's Exhibit 2. The petition contains the signatures of 102 employees. No evidence was presented indicating that any of the signatures were forged, although two employee [*sic*] did sign the petition twice. Copies of the petition were distributed to employees during a shift change the day prior to the election. Approximately 100 copies of the petition were made and distributed in this manner. Some witnesses testified that they were told that the Petitioner intended to cancel the election if an insufficient number of employees signed the second petition.

No evidence was presented to establish that employees were coerced into signing the petition by the traditional means of threats, intimidation or promises of benefits. The Employer did, however, elicit testimony that one employee held the petition for five days before signing, that another employees [*sic*] was asked on three separate occasion [*sic*] to sign the second petition, that one employee was told that a wager had been made that he could convince the employee to sign the petition, and that another employee was told that he had to sign the petition. It is important to note that no

witness testified he was threatened with any adverse consequences or offered any inducement to sign the petition.

In *J. C. Penny Food Department*, 195 NLRB 921 (1972) the Board held that a union did not commit objectionable conduct by polling employees. In *Penny* the Board drew a distinction between an employer engaging in such conduct and a union engaging in the same conduct and found that an employer would indeed engage in objectionable conduct by polling its employees while a union would not. The disparate treatment rests upon the fact that employers have the ability to affect employees terms and conditions of employment while unions do not. Since *Penny*, unions have been permitted to poll employees to determine support for an upcoming election as long as they do not engage any acts of coercion in connection with the polling. See, *Glamorise Foundation, Inc.*, 197 NLRB 729 (1972); *Springfield Hospital*, 281 NLRB 643 (1986); and, *Omni Manor, Inc.*, 309 NLRB 693 (1992).

In *Kusan Mfg. Company*, 267 NLRB 740 (1983) the Board was presented with a factual situation quite similar to the facts herein. Therein, the union solicited employees to sign a petition evidencing their support a few days prior to the Board election. Thereafter, the union copied the petition and distributed it to employees at the employer's facility. The Board affirmed the administrative law judge, without comment, who found that the union did not engage in objectionable conduct either by conducting the poll or publishing the results to unit employees before the election. Based upon *Kusan*, I find that neither Petitioner's polling of

employees or its publishing of the results are *per se* objectionable conduct.

I find that the Employer's evidence that employees were coerced into signing the second petition by being asked on more than one occasion to sign the petition, being told that there was a bet that the employees would sign, and being told to sign the second petition is insufficient to establish that those employees were coerced by the Petitioner into signing the petition.

The Employer did not present any evidence to establish that any employee was coerced during polling by threats, promises or any other intimidating conduct. It did, however, attempt to present evidence that employees subjectively felt intimidated by being requested to sign the second petition. This evidence is incompetent to establish that the Petitioner tainted its polling of employees. The Board has consistently held that when judging such conduct an objective standard must be used and that the subjective feelings of employees is irrelevant. See, *Hopkins Nursing Home*, 309 NLRB 958 (1992) ft. 4; *Picoma Industries, Inc.*, 296 NLRB 498 (1989) at 499; and, *Worths Stores Corp.*, 281 NLRB 1191 (1986).

The Employer argued that Petitioner nonetheless coerced employees by threatening to cancel the election. I reject this argument and find that any comment made by the Petitioner indicating that it would cancel the election was insufficient to convert the polling to objectionable conduct. Under Section 102.60(a) of the Board's Rules and Regulations, petitioners have the right to submit a request to the Regional Director to withdraw their underlying election petition. All such withdrawal requests are, however, subject to the ap-

proval of the Regional Director and will not be approved if they adversely affect the rights of the employees. If approval of a withdrawal request would not effectuate the purposes of the Act, the Regional Director would not approve it, and the election would continue as scheduled. The Employer is attempting to establish objectionable conduct based upon a right granted the Petitioner under the Board's Rules and Regulations. I find that the Petitioner did not engaged [*sic*] in objectionable conduct by advising employees that it might attempt to cancel the election since any such withdrawal request would have to be approved by the Regional Director.

The Employer argued that the second petition falsely and deceptively portrayed the Petitioner's support in the unit and thus constituted objectionable conduct. In support of this argument the Employer presented testimony from several witnesses indicating that they signed the petition even though they had no intent to vote for the Petitioner at the election. Each of these witnesses testified that they were asked if they wished to sign the petition and none testified that they were threatened with any adverse action or that they were offered any inducement to sign the petition. Additionally, no evidence was presented to establish that any of the witnesses advised the Petitioner that they were signing the second petition even though they had no intent of voting for it in the election. The Petitioner had the right under settled Board law to conduct the poll of employees' sentiments and to distribute the results. The fact that some employees may have signed the second petition for some reason other than to reflect their true intent at the time of signing cannot be held against the Petitioner especially since no evidence

was presented to indicate that the Petitioner intentionally misrepresented its support or that any employee was coerced into signing the petition.

Even if the second petition may have misrepresented the strength of the Petitioner, I do not find its publication as objectionable conduct. The Board has long held that it will not judge the misrepresentations of the parties' propaganda during an organizational campaign. *Midland National Life Ins. Co.*, 263 NLRB 127 (1982). The only exception to this rule is found where the propaganda is so artfully drawn that the employees could not determine the truth. See, *Aero Ind., Inc.*, 314 NLRB 741 (1994), and *Care Enterprises, Inc.*, 306 NLRB 491 (1992). The petition was clearly from the Petitioner, and I find that its truthfulness could be adequately judged by the employees.

Some witnesses did testified [*sic*] that they were mislead [*sic*] into signing the petition by being told that their signatures would not be published. I do not find this testimony convincing. Each page of the petition carried a printed portion at the bottom of each page which stated that "I understand that my signature will be used in a leaflet or in any other way that shows my commitment to taking charge of my future." If any employee had any question how their signature might be used after reading this portion of the petition, or if they failed to read this section before signing, the misconception was corrected by Petitioner's letter of December 3, Employer Exhibit 1. This letter was sent to all unit employees while the second petition was being circulated. It states that by signing the second petition, "you are giving permission to use your name in a leaflet indicating your support." Accordingly, I find

that the employees chose to sign the petition of their own free will and they should have realized that their signatures might be used by the Petitioner in its campaign literature.

At hearing and in its brief the Employer argued that employees who signed the second petition were require [*sic*] to vote for the Petitioner at the election. I reject this argument as unfounded. The fact that an employee signed the petition does not require the employee to vote for the Petitioner. When employees cast their ballot at a Board conducted election, they do so in secret and they vote their own conscience. This would be no less so because the employee signed the second petition. The signing of the petition reflected no more than the employee's expressed intent to vote for the Petitioner at the time the document was signed and was not legally binding. This conclusion was clearly evidenced by some of the Employer's own witnesses who testified that they signed the petition even though they had no intent to vote for the Petitioner at the election.

For the above reasons, Employer's Objection 1 is hereby overruled.

Objection No. 2

Objection 2 alleges that the Petitioner engaged in electioneering during the first voting session of the election by posting campaign literature in the voting area.

The election was conducted in the Employer's lunch room at two separate sessions on Thursday, December 12. The first session was held from 6:30 a.m. to 8:00

a.m. The Employer presented evidence that employee Michael Raffler reported to work at 3:00 a.m. on the day of the election. At about 4:00 a.m. he went in the lunchroom for his break. While in the lunchroom, he noticed that two of Petitioner's campaign flyers, Employer's Exhibit 3 and 4, had been placed in the lunchroom windows. The windows are covered by screens, but there was a small crack between the window casing and the screen which was apparently use to inset the flyers. Raffler voted at the morning session at about 7:00 a.m. As he left the voting area he noticed that the flyers were still in the window. These flyers remained in the lunchroom windows until the 9:00 a.m. break when they were removed by Paulette Krebill, Employer's human resource manager, and another employee. The flyers were not in the lunchroom windows at the time of the second voting session. No evidence was present indicating who placed the flyers in the window.

Without evidence establishing that the Petitioner or one of its agents placed the flyers in the windows, this conduct must be judged upon the third party standard established by the Board. Under this standard the conduct can only be considered as objectionable if it created an atmosphere of hostility which precluded a fair and impartial conduct of the election. See *Dunham's Athleisure Corp.*, 315 NLRB 689 (1994); *O'Brien Memorial*, 310 NLRB 942, ft. 1 (1993); and, *Westwood Horizon Hotel*, 270 NLRB 802, 803 (1984). I find that the posting of the two flyers in the polling area did not create such an atmosphere, and the mere fact that flyers supporting the Petitioner were in the polling area during the first polling session is insufficient to

establish objectionable conduct or justify setting the election aside.

For the above reason, Objection 2 is hereby overruled.

Objection No. 3

Objection 3 alleges that the Petitioner stole confidential documents from the Employer, published them to the employees in the unit and thereby misrepresented to the employees that it had unique access to Employer files and information.

The evidence presented to support this objection indicates that some employees went through the Employer's trash and discovered documents that the Employer had discarded. One document, Exhibit 5, was faxed to Petitioner and was distributed to the employees. The document indicates that the Employer was conducting a meeting to review a video in preparation for the Employer's 24-hour speech to employees. This document was acknowledged as authentic by the Employer and it did not contend that it was misleading in nature.

Employee Karl Wiltse testified that at some unspecified time prior to the election he had a conversation with employee Tim Hill in which Hill told him that he found a document in the trash indicating that the Employer spent $129,000 to remodel the front office, that he was subsequently shown the document by Hill, and that the document indicated that $30,000 had been spent during remolding [*sic*] and that there was $129,000 left in the account. No evidence was presented to indicate that this document was not authentic.

Additional evidence was presented that someone, not the Petitioner, posted a document indicating that Employer's managerial employees received bonuses. No evidence was presented to indicate that bonuses were not given to these employees or that the amount of the bonuses was incorrect.

The evidence clearly establishes that employees rummaged through the Employer's trash and found documents that were subsequently used by the Petitioner, or employees that apparently supported the Petitioner in the election. Contrary to the Employer, I do not find that this evidence establishes that the Petitioner had unique access to confidential information. The Board does not condone the use of purloined documents or documents scavenged from the trash, but I do not view the Petitioner's use of documents so obtained as objectionable conduct calling for the setting aside of the election.

For the above reasons, Objection 3 is hereby overruled.

Objection No. 4

Objection 4 alleges that the Petitioner distributed to employees what purported to be endorsements by customers of the Employer.

This objection centers around Employer's Exhibits 6 and 7 which were distributed to the employees by the Petitioner during its organizational campaign. The Employer presented testimony from three witnesses indicating that they believed, at least initially, that Exhibit 6 came from Lionel Trains, Inc., a customer of the Employer. No testimonial evidence was presented

regarding Exhibit 7. I find that neither the exhibits nor the testimony regarding Exhibit 6 is sufficient to establish objectionable conduct.

When Exhibit 6 is examined it is clear that the letter is not from Lionel but from International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local No. 417. The letter is on Local 417's stationery which is clearly evidenced by the letterhead. It is signed by the president and bargaining chair of the local. It is not on Lionel stationery or signed by anyone purporting to be an agent of Lionel. The only portion of the letter which might possibly give rise to an inference that the letter came from Lionel is the phrase in the first sentence stating that the Employer "is one of our suppliers." Any inference that this letter might be from Lionel is negated by a cursory examination of the letter itself. This letter was not from Lionel and could not reasonably be assumed to have come from Lionel. It is a piece of propaganda distributed by the Petitioner during its organizational campaign and would be seen as such by the average employee in the unit.

The Employer's arguments regarding Exhibit 7 are similarly flawed. Even a casual examination of this exhibit reveals that it is propaganda from the Petitioner designed to convince employees to support it in the election. The letter is addressed to employees in the unit, signed by "Your Fellow UAW Supporters," and encourages support for the Petitioner. Nothing in the document indicates that it is from any employer let alone from one of the Employer's customers. Clearly, this document was part of the Petitioner's attempt to convince employees to vote for it in the election and

would not have been viewed otherwise by the employees. It is not so artfully drawn that it would deceive any employee from discerning its origins.

This objection is simply not supported by the facts presented at hearing. Accordingly, this objection is hereby dismissed.

Objection No. 5

This objection alleges that the Petitioner promised employees that they would have their own local and not be part of an amalgamated local.

The Employer did not present any testimonial evidence to establish that any employee was promised a separate local union if the Petitioner prevailed at the election. It did, however, argue in its brief that Employer's Exhibits 5, 9 and 10 establish that the Petitioner promised employees their own local. Employer further argued in its brief that obvious benefits arise from having an individual local, i.e. the use of local funds, election of local officers and other issues of local authority.

I do not find these arguments persuasive. There was no specific promise made by the Petitioner that the employees would have their own local union and I do not find that the flyers used by the Petitioner during the campaign support Employer's arguments. Even if such a promise was made, I do not see this as an inducement sufficient to justify setting the election aside. Clearly, a local would have the authority to use its funds and elect its own officers, but no evidence was presented to establish that the results would be different if the Employer's employees were included in

an amalgamated local. They would have the same basic right to elect their own representatives and decide how their local dues would be spent. Without some meaningful inducement to bribe the employees to vote for it, the Petitioner cannot be found to have engaged in objectionable conduct.

For the above reason, Objection 5 is hereby dismissed.

Objection No. 6

The last objection presented by the Employer is a catchall objection including the allegations of Objections 1 to 5, above, and "other conduct." No evidence of any other conduct was presented by the Employer or argued in its brief as objectionable. Accordingly, without regard to the sufficiency of this objection itself, it will be overruled based upon the total lack of evidence presented to establish objectionable conduct not covered by Objections 1 through 5.

RECOMMENDATION

Based upon the foregoing and the record as a whole, I recommend that all of the Employer's objections be overruled and that a Certification of Representative issue.[4]

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[4] Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions may be files [*sic*] with the Board in Washing [*sic*], D. C. 20570, with copies being served on all of the parties, including the Regional Director of Region 7. Exceptions must be received by the Board in Washington, D. C. by May 28, 1997.

Signed at Grand Rapids, Michigan, this 14th day of May, 1997.

/s/ HOWARD M. DODD
Howard M. Dodd, Hearing Officer
National Labor Relations Board
Region Seven
Grand Rapids Resident Office
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